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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1973

No. 73-798

FRANCISCO ENTERPRISES, INC.,
a corporation,
*Petitioner,*

vs.

EDWARD J. KIRBY, PETER T. SEXTON,
RONALD LOCKYER and JAY D. CALDISS,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit

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**PETITION FOR WRIT OF CERTIORARI**
**to the United States Court of Appeals**
**for the Ninth Circuit**

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on August 20, 1073.

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**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 482 F.2d 481 and is attached hereto as Appendix 1.

The unreported decision of the District Court is attached as Appendix 2. The state hearing officer's proposed decision and the certificate of its adoption by the California Department of Alcoholic Beverage Control are unreported and are attached as Appendices 3-A and 3-B respectively. The unreported decision of the California Alcoholic Beverage Control Appeals Board is attached as Appendix 4.

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## JURISDICTION

The Court of Appeals' decision was filed on July 19, 1973. Petitioner's timely petition for rehearing was denied on August 20, 1973. This Court's jurisdiction to entertain this petition exists under 28 U.S.C. §1254(1).

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## QUESTIONS PRESENTED

1. Whether petitioner is barred by res judicata from invoking the jurisdiction of a federal court to assert a claim under 42 U.S.C. §1983, when the prior "adjudication" was rendered by a state administrative agency exercising quasi-judicial powers, whose members serve at the pleasure of the governor and whose decisions are not reviewable as of right by a state court?

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## TEXTUAL LAWS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Title 28, United States Code, Section 1343(3):

*Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

. . . .

Title 42, United States Code, Section 1983:

*Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Constitution, Article 20, Section 22: (Appendix 5)

California Business and Professions Code:

*§ 23090 Application for writ of review; persons entitled; court; limitations*

Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made with-

in 30 days after filing of the final order of the board.

West's Annot. Calif. Codes, Business & Professions (Vol. 5A), 1973 pocket supp., p. 10.

*§ 23090.2 Scope of review*

The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:

(a) The department has proceeded without or in excess of its jurisdiction.

(b) The department has proceeded in the manner required by law.

(c) The decision of the department is supported by the findings.

(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.

(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.

West's Annot. Calif. Codes, Business & Professions, (Vol. 5A) 1973 pocket supp., p. 11.

*§ 23090.3 Conclusiveness of findings and conclusions; appearance of parties; judgment*

The findings and conclusions of the department on questions of fact are conclusive and final and

are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department.

West's Annot. Calif. Codes, Business & Professions (Vol. 5A), 1973 pocket supp., p. 12.

*§ 23090.5 Injunction; mandamus*

No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case.

West's Annot. Calif. Codes, Business & Professions (Vol. 5A), 1973 pocket supp., p. 12.

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## STATEMENT OF THE CASE

Petitioner is a corporation which owned and operated as its sole asset a tavern in San Francisco; it held a general on-sale liquor license issued by the

California Department of Alcoholic Beverage Control, applicable to those premises. On June 26, 1967, the Department filed a 2-count accusation alleging that continuance of petitioner's license "would be contrary to public welfare and morals. . . ."

Count I alleged that the license should be revoked for the reason that the premises were a "disorderly house and a place to which people resorted for purposes injurious to the public morals, health, convenience and safety. . ." Eleven "acts of disorder," occurring on various dates between September 1, 1966 and June 1, 1967 were alleged in suport of the accusation.

Count II alleged that the license should be suspended for the reason that on or about April 26, 1967 the president of the corporation had in his possession for sale or distribution two simulated rubber penises. [A true copy of the accusation is attached as Appendix 6].

After a trial-type administrative hearing held on September 18 and 19, 1967 and May 27, 1968, the hearing officer issued on July 11, 1968 a "Proposed Decision" (Appendix 3-A) finding all of the facts to be true as alleged in the accusation and recommending revocation of the license under Count I and suspension for 30 days under Count II. The findings were framed in terms that merely summarized the accusation. On July 18, 1968, the Department of Alcoholic Beverage Control, without further hearing, adopted the proposed decision as its own decision and notified petitioner to surrender its license certificate (Appendix 3-B).

On June 18, 1970, the Alcoholic Beverage Control Appeals Board (a specially created administrative review panel, not empowered to conduct a *de novo* hearing) affirmed the Department's decision as to Count I (revocation) and reversed as to Count II (suspension).[1]

At the administrative hearing petitioner had denied all allegations of the accusation and in addition raised defenses based on the Fourth and Fourteenth Amendments.

Petitioner's application to the California Court of Appeal for a writ of review, filed on July 17, 1970, was denied without opinion 3 days later on July 20th. A timely petition for hearing in the California Supreme Court was likewise denied without opinion on September 10, 1970. Petitioner's license was revoked effective October 1, 1970.

Petitioner elected not to seek review by certiorari in this Court. Rather, on November 4, 1970 it filed a complaint in the United States District Court for the Northern District of California, invoking jurisdiction, *inter alia,* under 28 U.S.C. §1343(3) and seeking in-

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[1]The Appeals Board's decision notes the characterization of the record from the Department's brief respecting Count II (Appendix, 4, p. 26): "In checking the office, in general, including the files, papers, cashbox, etc., investigator Ferraro observed a brown paper bag located on top of a desk. In checking the bag, investigator Ferraro found two (2) simulated rubber penises."

The Appeals Board, however, while it "acknowledge[d] a question" as to the scope of the search (Appendix 4, p. 28) avoided the Fourth Amendment question and ruled that the evidence was insufficient to support the finding that possession of the objects by an officer of the corporation rendered continuance of the license contrary to public welfare or morals.

junctive relief under 42 U.S.C. §1983. (The complaint is attached as Appendix 7).

The complaint alleged, among other things, the following facts in support of petitioner's claim that the activities of the Department of Alcoholic Beverage Control deprived petitioner of rights assured under the First, Fourth and Fourteenth Amendments:

(1) That respondents had brought and prosecuted the accusation against its license under color of state law "pursuant to a plan, scheme and conspiracy to eliminate plaintiff's business because it is frequented by adult male homosexuals and for no other reason."

(2) That on April 26, 1967 (the date of the offense alleged in Count II) respondent's agents "ransacked and conducted a general search of plaintiff's offices without warrant and without probable cause to search said premises, for the purpose of harassing and intimidating plaintiff and causing it to go out of business." And,

(3) That respondents' agents "disguised themselves as homosexuals and solicited acts of homosexual conduct in plaintiff's premises for the purpose of manufacturing evidence upon which to base" the accusation against petitioner's license.

The district court dismissed the complaint, relying on *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), *Flynn v. State Board of Chiropractic Examiners*, 418 F.2d 668 (9th Cir., 1969) and *Wilke-Holzheiser, Inc. v. Reimel*, 266 F.Supp. 168 (N.D. Cal. 1967) for the proposition that "The law is well-settled that a District Court may not entertain appellate review of a

state court judgment, nor hear a collateral attack against such a judgment by considering a cause of action for injunctive relief." (Appendix 2, p. 11.)

The Court of Appeals affirmed. And, while recognizing "that application of res judicata principles to actions brought under §1983 has been criticized," the Court concluded that "change, if any, in that area must emanate from the Supreme Court." (Appendix 1, pp. 8-9.)

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## REASONS FOR GRANTING THE WRIT

**The Decision Below Precludes Petitioner From Securing A Federal Forum To Protect Its Federal Civil Rights Threatened By State Administrative Sanctions; It Thus Raises Important And Timely Questions Concerning The Proper Balance Between The Duty Of A Federal Court To Entertain Federal Claims And The Respect Due State Processes.**

Petitioner, like other litigants now threatened with state administrative sanctions, is confronted with a trap for the wary. Had petitioner applied for federal relief at the threshold of proceedings on the accusation against its license it would have been commanded to exhaust state administrative remedies before pressing its §1983 claim. Now, having done so, its federal claim is foreclosed by the defense of *res judicata.*

This court and the courts of appeals have mandated a proper respect for the integrity of state processes, whether judicial (*Younger v. Harris,* 401 U.S. 37, 44) or administrative (*Preiser v. Rodriguez,* 411 U.S. 475). Petitioner complied with the direction of the lower federal courts, that state administrative proceedings must be exhausted before assertion of a

federal claim under 42 U.S.C. §1983, at least where the state procedure is not clearly inadequate and the actual deprivation has not yet occurred. *Eisen v. Eastman,* 421 F.2d 560 (2d Cir., 1969); *Whitner v. Davis,* 410 F.2d 24 (9th Cir., 1969).[2]

The decision below exacerbates a continuing conflict between two important principles of our federal system: On the one hand, the interest in judicial repose underlying traditional notions of res judicata and concern for federal-state comity underlying abstention and exhaustion doctrines; on the other hand, the obligation under federal law to assure a federal forum "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" *Ex parte Virginia,* 100 U.S. 339, 346; *Mitchum v. Foster,* 407 U.S. 225.

The proper equipoise between these objectives has recently been deemed an "important and timely" issue by two members of this court. *Florida State Bd. of Dentistry v. Mack,* 401 U.S. 960 (White, J. with Burger, C.J. dissenting from denial of certiorari). Cf. *Mitchum v. Foster,* 407 U.S. 225, 243, (Burger, C.J. concurring).

The balance has tipped in favor of federal deference to state proceedings where the state offered a remedial administrative process, *Prentis v. Atlantic*

[2]No purpose would have been served by petitioner's filing a ritualistic complaint in the district court before conclusion of the State proceedings, in light of the requirement under *Whitner v. Davis, supra,* that administrative remedies be exhausted before seeking federal relief. Cf. *England v. La. Bd. of Medical Examiners,* 375 U.S. 411.

*Coast Line Co.*, 211 U.S. 210. *Eisen v. Eastman, supra, Whitner v. Davis, supra,* where federal intervention would subvert the fundamental integrity of state criminal or administrative processes, *Younger v. Harris, supra, Preiser v. Rodriguez, supra,* or where the litigant deliberately chooses a state forum rather than a federal one, *Florida State Bd. of Dentistry v. Mack, supra* (dissent from denial of certiorari), *England v. Bd of Medical Examiners, supra, P. I. Enterprises v. Cataldo,* 457 F.2d 1012 (1st Cir., 1972).

Petitioner, asserting a First Amendment interest of its patrons to gather peaceably in a congenial environment and its own interest in being free from unreasonable search and seizure, did not elect the state forum. Petitioner is now told that its caution in exhausting state administrative remedies is rewarded by an impenetrable barrier to a hearing in the district court and that only by certiorari from this court might its federal claim have been heard.

Both the court of appeals and the district court overlooked settled law that, regardless of the status of the Department of Alcoholic Beverage Control under state law, it is not a state court within the meaning of 28 U.S.C. §1257(3).[3] (See *Staten Island Transit Co. v. Transit Comm'n of the State of New York,* 276 U.S. 603 (1928): "The writs of error are dismissed for lack of jurisdiction in that the writs herein are directed not to a court but to an administrative commission.")

[3] "An administrative decision of a state administrative body . . . clearly cannot be reviewed by the Supreme Court even though no further appeal exists under state law." Stern & Gressman, *Supreme Court Practice,* 4th Ed. p. 115, 1969.

And, as this court stressed in *England, supra,* 375 U.S. at pp. 416-417:

> "It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. (Citations) But such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination—often by three judges, 28 U.S.C. §2281—to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact."

The decision below is based on the notion that the forum before which petitioner was compelled to appear—because it possesses quasi-judicial powers—is now dignified as a state "court," with the "solemn duty . . . to safeguard personal liberties and consider federal claims in accordance with federal law" (Powell, J., concurring in *Schkneckloth v. Bustamente,* ..... U.S. ....., 93 S.Ct. 2041, 2064). Both of the courts below, however, gave inadequate attention to the criteria on which they concluded that the Department of Alcoholic Beverage Control is a "court."

The state constitutional and statutory scheme governing the state proceedings is designed to afford maximum insulation of the Department of Alcoholic Beverage Control from judicial meddling while assuring that the Department remains responsive to the wishes of the state executive officer.[4] The Department

[4]This is the same administrative agency whose quasi-legislative powers were before this court in *California v. LaRue,* 409 U.S. 109.

lacks even the rudimentary independence necessary for true judicial deliberation: both the Director of the Department and all members of the Appeals Board are appointed by, serve at the pleasure of, and may be removed by, the Governor. No cause need be specified for removal by the Governor, but removal by the legislature must be by a majority of both houses and for specified misconduct. (Calif. Const., Art. 20, §22, fourth and sixth paragraphs.) Unlike all other state administrative licensing agencies, judicial review of the Department's decisions is restricted to the discretionary writ of review (certiorari) in the appellate courts of the state. (Calif. Business & Professions Code, §23090.5). And in both administrative and judicial review, the findings and conclusions of the Department on questions of fact "are conclusive and final and are not subject to review." (Calif. Business & Professions Code, §23090.3.)

The District Court below conceded that "there are no California cases directly in point," (Appendix 2, p. 13) but nevertheless concluded that California law treated the Department as a court because it performed "quasi-judicial functions." (App. 2, p. 14, citing *Covert v. State Board of Equalization,* 20 Cal. 2d 125, 131, 173 P.2d 545 (1946).)

This legal zephyr slammed shut the door to petitioner's assertion of a claim created by Congress and falling squarely within the literal terms of the federal jurisdictional statute.

## CONCLUSION

Should the decision below stand, henceforth at least in the Second and Ninth Circuits litigants who face state administrative sanctions will have no access to a federal forum for their constitutional claims, since, following the exhaustion requirements imposed in those circuits, they will be met by the successful defense that their claims have already been decided. That defense turns not on the merits but on the characterization of the state tribunal under state law. In this case, that result forecloses any judicial scrutiny, state or federal, of petitioner's claim.

The writ should issue, not merely to redress this pointless inequity but to illuminate important federal questions respecting the proper conditions for seeking federal relief from state administrative deprivations of rights secured by the Constitution and laws of the United States.

Dated, November 16, 1973.

Respectfully submitted,
GARRY, DREYFUS, MCTERNAN & BROTSKY,
By FRANCIS J. MCTERNAN,
*Counsel for Petitioner.*

DAVID E. PESONEN,
*Of Counsel.*

**(Appendices Follow)**

## Appendix I

United States Court of Appeals,
Ninth Circuit.

No. 71-1813.

Francisco Enterprises, Inc., a corporation,
Plaintiff-Appellant,

vs.

Edward J. Kirby, et al.,
Defendants-Appellees.

July 19, 1973.

Rehearing Denied Aug. 20, 1973.

Before: HAMLIN and ELY, Circuit Judges, and KELLEHER,* District Judge.

HAMLIN, Circuit Judge:

Francisco Enterprises, Inc., appellant herein, appeals from an order of the United States District Court for the Northern District of California, dismissing its action for injunctive relief brought against officers of the California Department of Alcoholic Beverage Control, appellees herein. Our jurisdiction is predicated upon 28 U.S.C. §§ 1291 and 1292. We affirm the district court's conclusion that the finality

*Honorable Robert J. Kelleher, United States District Judge, Los Angeles, California, sitting by designation.

principles of res judicata precluded its review of appellant's complaint.

Until October 1, 1970, appellant was a corporate on-sale general public premises licensee of the California Department of Alcoholic Beverage Control, in the city and county of San Francisco, and as such exercised the privileges of selling alcoholic beverages at retail consumption on its licensed premises.

On June 8, 1967, an accusation was filed with the California Department of Alcoholic Beverage Control (hereinafter the Department) against appellant's alcoholic beverage license.

The accusation, pled in two counts, alleged in substance that continuance of appellant's alcoholic beverage license would be contrary to public welfare and morals, within the meaning of Article XX, Section 22, of the California Constitution, and sections 24200 (a), 24200(b) and 25601 of the California Alcoholic Beverage Control Act (Div. 9, Cal. Business and Professions Code).[1] The accusation alleged that appellant

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[1]Article XX, section 22, California Constitution, provides in part:

"The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

"All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the

"did permit, allow and suffer the * * * [licensed premises] to be used as a disorderly house and a place

licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic beverages specified in the licenses may be sold and served for consumption upon the premises:

(a) For bona fide public eating places, as defined by the Legislature.

(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years shall be permitted to enter and remain in any such premises without lawful business therein.

(c) For public premises for the sale and service of beers alone.

(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

* * * * * * *

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State."

California Business and Professions Code, sections 24200(a)(b), provide as follows:

"The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution.

(b) Except as limited by Chapters 11 and 12 of this division, the violation or the causing or the permitting of a viola-

to which people resorted for purposes injurious to th public mind, health, convenience and safety * * *."

Count I of the accusation was pled in eleven sub counts, and alleged that on various respective date between September 1, 1966, and June 1, 1967, certai activities described in the accusation had occurred o appellant's licensed premises.

Count II alleged that on April 26, 1967, appellant' president had in his possession, for sale or distribu tion, two named objects, conduct claimed to be con trary to public welfare or morals.

On September 18 and 19, 1967, and May 27, 1968 hearings were held on the accusation before the De partment's hearing officer. On July 11, 1968, the hear ing officer submitted a proposed decision which foun the allegations of the accusation to be true, and whic provided for revocation of appellant's alcoholic bever ages license on Count I, and a 30-day suspension o the license on Count II.

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tion by a licensee of this division, any rules of the boar adopted pursuant to Part 14 of Division 2 of the Revenue an Taxation Code or any rules of the department adopted pur suant to the provisions of this division, or any other pena provisions of law of this State prohibiting or regulating th sale, exposing for sale, use, possession, giving away, adultera tion, dilution, misbranding, or mislabelling of alcoholic bev erages or intoxicating liquors."

California Business and Professions Code, section 25601, pro vides as follows:

"Every licensee, or agent or employee of a licensee, wh keeps, permits to be used, or suffers to be used, in conjunctio with a licensed premises, any disorderly house or place i which people abide or to which people resort, to the disturb ance of the neighborhood, or in which people abide or to whic people resort for purposes which are injurious to the publi morals, health, convenience, or safety, is guilty of a mis demeanor."

On July 18, 1968, the Department adopted the proposed decision.

Appellant appealed the Department's decision to the California Alcoholic Beverage Control Appeals Board (hereinafter Appeals Board), the appellant tribunal established by Article XX, Section 22, of the California Constitution to review decisions of the Department.

On June 18, 1970, after oral argument, the Appeals Board filed its opinion, wherein it affirmed the Department's decision as to Count I (providing for the revocation of appellant's license), but reversed the decision as to Count II (providing for a 30-day license suspension).

Appellant's subsequent petition for a writ of review in the California District Court of Appeal, First Appellate District, was denied. Its petition to the California Supreme Court for a hearing was likewise denied,[2] after which the revocation of appellant's alcoholic beverages license was placed in effect.

One month later, appellant filed its complaint in the United States District Court for the Northern District of California, seeking to have appellees restrained and enjoined from enforcing the revocation of its alcoholic beverages license, because of claimed violations of its rights under the First, Fourth, Fifth

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[2]Review by California appellate courts is purely discretionary. *See* section 1068, Cal.Code Civ.Pro. It is well established that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1955).

and Fourteenth Amendments and under the Civil Rights Act of 1871, presently codified as 42 U.S.C. § 1983.[3] Jurisdiction of the district court was alleged under 28 U.S.C. §§ 1331 and 1343(3).[4]

The federal complaint alleged (1) that the state revocation proceedings originated in a plan, scheme and conspiracy among appellees "to eliminate [appellant's] business because it is frequented by adult male homosexuals and for no other reason"; (2) that the revocation proceedings deprived appellant of due process and equal protection of the laws and chilled the freedom of association of its patrons; and (3) that the state statutory provisions pursuant to which appellant's license was revoked was framed in unconsti-

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[3] 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[4] 28 U.S.C. § 1331 provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1343(3) provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . . ."

tutionally vague terms of "public welfare or morals" and "public morals, health, convenience and safety."

The district court, relying upon Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); Flynn v. State Board of Chiropractic Examiners, 418 F.2d 668 (9 Cir. 1969), and Wilke & Holzheiser, Inc. v. Reimel, 266 F.Supp. 168 (N.D.Cal. 1967), dismissed appellant's complaint on the grounds that "a District Court may not entertain appellate review of a state court judgment, nor hear collateral attack against such a judgment by considering a cause of action for injunctive relief." The district court stated that appellant's remedy under the circumstances was "that of appeal or petition for certiorari in the United States Supreme Court."

The district court's dismissal on the above grounds was predicated upon a determination that "the California Department of Alcoholic Beverage Control is a state court of limited jurisdiction." The district court made such a determination after examination of relevant California law. Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal.2d 238, 340 P.2d 1 (1959); Covert v. State Board of Equalization, 29 Cal.2d 300, 173 P.2d 545 (1946).

We agree with the district court's conclusion that California law considers the Department of Alcoholic Beverage Control to be a state court of limited jurisdiction. *See Martin, supra; Covert, supra,* and that res judicata principles precluded its entertaining the federal complaint.

Res judicata principles have been consistently applied to preclude parties from relitigating federal constitutional claims in a federal district court subsequent to an adverse determination on the merits[5] of such claims by a state court of competent jurisdiction. The sole recourse for the losing litigant is by appeal or writ of certiorari to the United States Supreme Court.[6]

Further, res judicata principles have been expressly applied to actions brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. P I Enterprises Inc. v. Cataldo, 457 F.2d 1012 (1 Cir. 1972); Taylor v. New York City Transit Authority, 433 F.2d 665 (2 Cir.) aff'g, 309 F.Supp. 785 (S.D.N.Y.1970); Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6 Cir. 1970); Brown v. Chastain, 416 F.2d 1012 (5 Cir. 1969); Rhodes v. Meyer, 334 F.2d 709 (8 Cir.), cert. den. 379 U.S. 915, 85 S.Ct. 263, 13 L.Ed.2d 186 (1964); Goss v. Illinois, 312 F.2d 257 (7 Cir. 1963).

While we recognize that application of res judicata principles to actions brought under section 1983 has

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[5]For res judicata purposes, a judgment "on the merits" has been liberally construed. *See Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). In *Angel*, the Court held res judicata principles to preclude a federal district court from entertaining federal constitutional issues which were not, but could have been submitted to and determined in the state courts.

[6]*See Rooker, supra, Flynn, supra,* and *Wilke & Holzheiser, supra*. *See also, e.g.*, Sitton v. United States, 413 F.2d 1386 (5 Cir. 1969); Resolute Insurance Co. v. State of North Carolina, 397 F.2d 586 (4 Cir. 1968); Ash v. Northern Illinois Gas Co., 362 F.2d 148 (7 Cir. 1966); Lavasek v. White, 339 F.2d 861 (10 Cir. 1965) *Cf.* Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5 Cir. 1970).

been criticized,[7] change, if any, in that area must emanate from the Supreme Court.

Inasmuch as the district court properly concluded that res judicata principles precluded its entertaining the federal complaint, Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) is of no solace to appellant.

Judgment affirmed.

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[7] *See* Preiser v. Rodriguez, 411 U.S. 475 at 499, fn. 14, 93 S.Ct. 1827 at 1841, 36 L.Ed.2d 439 (1973) (Brennan, J., dissenting); Brown v. Chastain *supra*, 416 F.2d at 1020-1021 (Rives, J., dissenting). *See also, Florida State Board of Dentistry v. Mack*, 401 U.S. 960, 961, 91 S.Ct. 971, 28 L.Ed.2d 245 (1971) (White, J., dissenting from denial of cert.).

## Appendix 2

In the United States District Court
Northern District of California

No. C-70 2372 RFP

Francisco Enterprises, Inc., a corporation,
Plaintiff,

vs.

Edward J. Kirby, et al.,
Defendants.

[Filed Mar. 29, 1971]

Plaintiff filed this action to challenge the constitu
tionality of the revocation of its on-sale, general, pub
lic premises alcoholic beverages license by the Cal
fornia Department of Alcoholic Beverage Contro
Plaintiff has unsuccessfully pursued his state rem
dies, having appealed the Department's decision t
the Alcoholic Beverage Control Appeals Board, an
then having sought writs of review from the Stat
Court of Appeals and the California Supreme Cour
Plaintiff seeks herein a preliminary injunction agains
enforcement of the revocation of its license.

Plaintiff's action is founded on claims arising fro
alleged violations of 42 U.S.C. §§ 1981, 1983, 1988 an
the First, Fourth, Fifth, Sixth, and Fourteent
Amendments to the United States Constitution. Th
matter in controversy exceeds the value of $10,000.0

Plaintiff invokes jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343(3)(4).

Defendants have moved for dismissal, contending that plaintiffs have failed to state a claim upon which relief may be granted. Defendants base their motion on the contention that a United States District Court may not exercise appellate review of a state court judgment and may not entertain a collateral attack against a state court judgment by way of an action for injunctive relief. Underlying this contention is the assumption that the California Department of Alcoholic Beverage Control is a state court of limited jurisdiction.

The law is well-settled that a District Court may not entertain appellate review of a state court judgment, nor hear a collateral attack against such a judgment by considering a cause of action for injunctive relief. *Flynn v. State Board of Chiropractic Examiners,* 418 F.2d 668 (9th Cir. 1969); *Wilke & Holzheiser, Inc. v. Reimel,* 266 F.Supp. 168 (N.D. Cal. 1967); *Rooker v. Fidelity Trust Company,* 263 U.S. 413, 68 L.Ed. 362 (1923). Thus, defendants' motion to dismiss turns on whether the Department of Alcoholic Beverage Control is a state court of limited jurisdiction such that its judgments are considered state court judgments.

In deciding this issue, it is important to review the relevant history of the control of alcoholic beverages in California. The California Constitution, Article XX, Section 22, as amended 1934, granted to the State Board of Equalization the exclusive power to license the manufacture, importation and sale of in-

toxicating liquors in California. In *Covert v. State Board of Equalization,* 29 Cal. 2d 125, 131, 173 P.2d 545 (1946), the Supreme Court of California stated:

> An examination of the Constitution of California shows that the State Board of Equalization, unlike most other agencies of statewide authority, [citation omitted], has specifically been given quasi judicial, or adjudicating power, that is, the right to make determinations of fact which are not subject to reexamination in a trial de novo in the superior court . . . In order to revoke a license the board obviously must examine the facts, resolve any conflicts in the evidence, and exercise its judgment thereto. A revocation may be only "for good cause," and accordingly, the board must afford an opportunity for a full hearing, an essential element of a quasi-judicial proceeding. [citations omitted]

By Constitutional amendment in 1954, the Department of Alcoholic Beverage Control became the successor to the State Board of Equalization in alcoholic beverage control matters. Cal. Constitution, Article XX, Section 22, as amended 1954; *Allied Properties v. Dept. of Alcoholic Beverage Control,* 53 Cal. 2d 141, 144, 346 P.2d 737 (1959). The portion of the 1954 amendment defining the powers of the Department was cast in language similar to that previously used in defining the constitutional powers of the State Board of Equalization with respect to liquor control. *Martin v. Alcoholic Beverage Control Appeals Board,* 52 Cal. 2d 238 (1959).

Under the 1954 amendment which is presently in effect, decisions of the Department are appealable to

the Alcoholic Beverage Control Appeals Board. The Appeals Board's powers are limited to a determination of whether the Department proceeded within its jurisdiction, whether the Department proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. Cal. Constitution, Article XX, Section 22, as amended 1954. Prior to 1967, the process of review after appeal before the Appeals Board was by petitioning the superior court for a writ of review, or in the alternative, for a writ of mandate. Cal. Code Civ. Proc. §§ 1067 et seq., 1094.5 Thereafter, application for a writ of review from the California Court of Appeal and/or the California Supreme Court was proper. In 1967, a legislative amendment took the superior court out of the possible route of review. Cal. Bus. & Prof. Code §§ 23090, 23090.5.

In *Martin v. Alcoholic Beverage Control Appeals Board,* 52 Cal.2d 238, 246 (1959) it was held that the powers of the Appeals Board were strictly limited, and that they were no greater than those previously exercised by the courts on judicial review of the decisions of the State Board of Equalization.

The foregoing legislative and case history indicates that the present Department of Alcoholic Beverage Control has succeeded to the status formerly held by the State Board of Equalization in matters of liquor control. Although there are no California cases directly in point, it is clear to this Court that the California courts do consider the Department of Alcoholic Beverage Control to be a state court of limited

jurisdiction, *Martin v. Alcoholic Beverage Control* Appeals Board, 52 Cal.2d 238 (1959), and similar in nature to other constitutionally created California state courts of limited jurisdiction such as the California Public Utilities Commission and the Workmen's Compensation Appeals Board. *Department of Alcoholic Beverage Control v. Superior Court*, 268 C.A. 2d 67, 73 Cal. Rptr. 780 (1968). In the *Martin* case, *supra*, 52 Cal.2d at 242, the California Supreme Court discussed the constitutional successorship of the Department of Alcoholic Beverage Control to the State Board of Equalization and then reiterated its opinion in *Covert, supra*, that the Board had quasi-judicial powers.

> In *Covert v. State Board of Equalization*, 20 Cal. 2d 125, 131, 173 P.2d 545 (1946), we compared the constitutional powers of the Board of Equalization to "those of a local administrative tribunal" having quasi judicial functions rather than those of a statewide administrative agency created by statute; and we outlined the limited nature of the judicial review of decisions of the State Board of Equalization.

Plaintiff herein contends that the Department of Alcoholic Beverage Control is an extension of the executive branch of the state government, and that to hold that it constitutes a court would violate the separation of powers provisions of the California Constitution. Plaintiff cites the concurring opinion in *Tulare Water Company v. State Water Commission*, 187 Cal. 533 (1921), to stand for the proposition that in the absence of an express constitutional provision conferring judicial powers upon an administrative

agency, the exercise of such powers by an administrative agency would violate the separation of powers doctrine. The *Covert* case, *supra,* is consistent with *Tulare Water Company,* as it held that the Board of Equalization could properly exercise quasi-judicial functions since it was so authorized by a specific constitutional provision. (Cal. Const., Art. XX, § 22, as amended 1934). Likewise, the Department of Alcoholic Beverage Control has similar constitutional authority, (Cal. Const., Art. XX, § 22, as amended 1954) and its operation as a court of limited jurisdiction does not violate the separation of powers doctrine.

Since the Department of Alcoholic Beverage Control is a state court of limited jurisdiction, this District Court cannot exercise appellate review over its judgment, nor entertain a collateral attack by way of an action for injunctive relief. *Flynn v. State Board of Chiropractic Examiners, supra, Wilke & Holzheiser, Inc. v. Reimel, supra; Rooker v. Fidelity Trust Company, supra.* Plaintiff's remedy after the Department of Alcoholic Beverage Control's decision became final by the denial of plaintiff's petition for a writ of review in the California Court of Appeal and in the California Supreme Court was that of appeal or petition for certiorari in the United States Supreme Court. *Wilke & Holzheiser v. Reimal, supra.*

Defendants' motion to dismiss this action is granted. The Clerk shall enter judgment accordingly.

Dated: March 25, 1971.

/s/Robert F. Peckham
United States District Judge

## Appendix 3-A

State of California
Department of Alcoholic Beverage Control
985 Total all folios

In the Matter of the Accusation
against
Francisco Enterprises, Inc.
dba: Fe Be's
1501 Folsom Street
San Francisco

On-Sale General,
Public Premises

under the Alcoholic Beverage Control Act.

File 57212 Licenses: 48

Reg. 3806

Time of Hearing: Sept. 18 & 19, 1967, and May 27, 1968

Place of Hearing: San Francisco, California

Reporter: Olivera 9/18 & 9/19/67, OSF-6243 63
Folios Levy 5/27/68, 300 Folios

Appearances:

For the Department:
Donald L. Tipton, Counsel

For the Respondent:
Charles R. Garry, Attorney
341 Market Street
San Francisco, California

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

## PROPOSED DECISION

The above-entitled matter came on regularly for hearing at the above indicated place and times. At the commencement of the proceedings, the respondent moved that the Accusation be dismissed on the grounds that the respondent's motion to compel answers be given to certain written interrogatories was denied. Evidence, oral, documentary and demonstrative, was received. During the course of the proceedings, the respondent made several motions to strike from the record the testimony of certain witnesses produced by the Department, rulings on which have been reserved. The respondent objected to the admission in evidence of Department's exhibits for identification numbers 2 and 3, ruling on which has been reserved. On September 19, 1968, during the noon recess, at the suggestion of respondent's counsel and pursuant to stipulation of the parties, the Hearing Officer, in the company of respective counsel, visited the respondent's premises and viewed the interior thereof. At the conclusion of the hearing on May 27, 1968, the record was closed excepting that provision was made for the subsequent filing of citations by respective counsel with the Hearing Officer concerning

the said motions to strike and the admissibility in evidence of Department's said exhibits marked for identification. No citations have been filed and the time allowed for such filing has expired. The matter is now ready for decision. After due consideration of the entire record and the Hearing Officer's observation of respondent's premises, the following decision is proposed:

*Rulings*

All motions made by the respondent to strike testimony from the record are hereby denied.

Department's exhibits marked for identification numbers 2 and 3 are hereby admitted in evidence.

Respondent's motion to dismiss the Accusation is hereby denied.

*Findings Of Fact:*

Count I

It is true that the respondent did permit, allow and suffer the above-mentioned licensed premises to be used as a disorderly house and a place to which people resorted for purposes injurious to the public morals, health, convenience, and safety in that on the following dates the following acts of disorder occurred:

a. On September 1, 1966, a male patron did fondle the genital area of another male patron.

b. On September 1, 1966, a male patron did kiss another male patron on the neck.

c. On May 19, 1967, a male patron did kiss a male employee on the left ear.

d. On May 24, 1967, a male patron did rub his buttocks area into the genital area of another male patron.

e. On May 24, 1967, a male patron did place his hand inside the trousers of another male patron.

f. On May 25, 1967, a male patron did kiss another male patron upon the mouth.

g. On May 25, 1967, two male patrons did place their arms around each other, grasping the buttocks area of each other, and engage in movements associated with sexual intercourse.

h. On May 26, 1967, a male patron did kiss another male patron upon the right ear and cheek.

i. On June 1, 1967, the respondent did suffer, allow and permit a male patron to engage in conversations which were lewd, vulgar, obscene and offensive on the above-named premises.

j. On June 1, 1967, a male patron did rub the genital area of Special Investigator Paul E. D'Andrea.

k. On June 1, 1967, a male patron did hug another male patron.

Count II

It is true that on April 26, 1967, respondent's president, John R. Kissinger, had in his possession for sale or distribution, two simulated rubber penises.

*Special Findings Of Fact:*

The said two objects were kept in the office of the licensed premises.

*Licensee's Previous Record:*

"48" Licensed at above premises since June 16, 1967; no disciplinary record.

*Determination Of Issues Presented:*

By reason of the foregoing facts found to be true under each of Counts I and II, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code. Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that the respondent has violated Business and Professions Code Section 25601 as found under each of Counts I and II.

*Penalty:*

Count I, the license is revoked.

Count II, the license is suspended for thirty (30) days.

Dated at: San Francisco, California,
July 11, 1968.

/s/ E. A. McDonald
Hearing Officer of the Office of
Administrative Procedure,
State of California.

## Appendix 3-B

State of California
Department of Alcoholic Beverage Control
Certificate of Decision

File 57212
Reg. 3806

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommended penalty, adopted said proposed decision as its decision in the case therein described on July 18, 1968.

A representative of the Department will call on you on or after September 5, 1968, to pick up the license certificate.

Sacramento, California
Dated: July 18, 1968

/s/ Dorothy Pierson
Hearing and Legal Unit

ABC-132 (1-67)

## Appendix 4

Before the Alcoholic Beverage Control Appeals Board
of the State of California
In the Matter of the Accusation
against
Francisco Enterprises, Inc.
dba Fe Be's
1501 Folsom Street
San Francisco
Respondent & Licensee
under the Alcoholic Beverage
Control Act.

[Filed June 18, 1970]

AB-3150

File No. 57212; Reg. No. 3806

Time & Place of Hearing:
January 9, 1969, @ 10 a.m.
World Trade Center
San Francisco, California

For Department:
Honorable Thomas Lynch
Attorney General

L. Stephen Porter
Deputy Attorney General

For Appellant:
Charles R. Garry, Esq.

The Department of Alcoholic Beverage Control filed an accusation against Francisco Enterprises, Inc., doing business as Fe Be's, on-sale general license,

public premises, 1501 Folsom Street, San Francisco. The accusation charged in count I 11 instances of misconduct occurring on the premises during the period September 1, 1966, to June 1, 1967. In count II the department charged appellant with violating section 311.2, Penal Code (distribution of obscene matter).

Following hearings held on September 18 and 19, 1967, and May 27, 1968, the hearing officer issued his proposed decision concerning Findings of Fact in support of the department's accusation. He determined that cause for discipline had been established under the provisions of sections 24200(a) and (b), 25601 Business and Professions Code, and article XX, section 22 of the California Constitution, thereby constituting continuance of the license contrary to public welfare or morals. A penalty of revocation of the license, count I, and a 30-day suspension, count II, was recommended. This proposed decision was adopted by the department on July 18, 1968, and contains the following:

*"Findings of Fact:*

*"Count I*

"It is true that the respondent did permit, allow and suffer the above-mentioned licensed premises to be used as a disorderly house and a place to which people resorted for purposes injurious to the public morals, health, convenience, and safety in that on the following dates the following acts of disorder occurred:

"a. On September 1, 1966, a male patron did fondle the genital area of another male person.

"b. On September 1, 1966, a male patron did kiss another male patron on the neck.

"c. On May 19, 1967, a male patron did kiss a male employee on the left ear.

"d. On May 24, 1967, a male patron did rub his buttocks area into the genital area of another male patron.

"e. On May 24, 1967, a male patron did place his hand inside the trousers of another male patron.

"f. On May 25, 1967, a male patron did kiss another male patron upon the mouth.

"g. On May 25, 1967, two male patrons did place their arms around each other, grasping the buttocks area of each other, and engage in movements associated with sexual intercourse.

"h. On May 26, 1967, a male patron did kiss another male patron upon the right ear and cheek.

"i. On June 1, 1967, the respondent did suffer, allow and permit a male patron to engage in conversations which were lewd, vulgar, obscene and offensive on the above-named premises.

"j. On June 1, 1967, a male patron did rub the genital area of Special Investigator Paul E. D'Andrea.

"k. On June 1, 1967, a male patron did hug another male patron.

*"Count II*

"It is true that on April 26, 1967, respondent's president, John R. Kissinger, had in his possession for sale or distribution, two simulated rubber penises.

*"Special Findings of Fact:*

"The said two objects were kept in the office of the licensed premises.

*"Determination of Issues Presented*

"By reason of the foregoing facts found to be true under each of Counts I and II, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code. Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that the respondent has violated Business and Professions Code Section 25601 as found under each of Counts I and II."

Appellant's appeal is based upon the grounds:

". . . that the Department has exceeded its jurisdiction in imposing penalties on appellant which are not supported by the evidence and without affording appellant a fair hearing as guaranteed by statutes of the State of California and the Constitution of the United States of America."

A lengthy record was developed at the department hearing. This board has been favored with extensive written and oral argument. The crucial issue in this matter revolves around the order of revocation imposed as to the violations set forth in count I. Before passing on the questions raised by appellant regarding count I, we will first consider count II.

The department in its accusation with respect to count II alleges:

> "*Count II:* The continuance of the above-named license would be contrary to public welfare and morals and grounds for suspension or revocation of said license exist within the meaning of Article XX, Section 22 of the California State Constitution, and Sections 24200(a), 24200(b) and 25601 of the Business and Professions Code in that on or about April 26, 1967, President John R. Kissinger had in his possession for sale or distribution, two simulated rubber penises."

In its accusation the department stated that this alleged violation involves section 311.2 of the Penal Code. The Penal Code provision is not mentioned in the department's decision. We accordingly presume that the department abandoned any thought that the alleged infraction involved any violation of the Penal Code.

The department in its brief sets out the following as to the factual situation involved in the purported count II violation:

> "In checking the office, in general, including the files, papers, cashbox, etc., investigator Ferrero observed a brown paper bag located on top of a desk. In checking the bag, investigator Ferrero found two (2) simulated rubber penises. (I RT 15:7-23; 16:1-4; 38:14-19; Dept. Exhs. #2 & #3) Ferrero inquired of Kissinger concerning the objects and Kissinger replied that he made them himself at his garage and had on occasion sold them over the bar at a price of $1 an inch. (I RT 16:15-17:4; 40:1-16; II RT 6:2-7:23) Ferrero told Kissinger not to sell such objects over the bar anymore. (I RT 41:18-26)"
>
> (Department's brief, pp. 9 and 10.)

At the department hearing the licensee raised strenuous objections to the introduction of the two exhibits (department exhibits 2 and 3). (R.T. 235, Vol. I.) The hearing officer reserved his ruling on the admission of the two exhibits. At the time he prepared the proposed decision, the two exhibits were admitted into evidence.

In argument appellant contends that the department exceeded its jurisdiction by receiving evidence obtained in violation of the Fourth and Fifth Amendment rights. It is also argued that the two exhibits should not have been introduced into evidence; that the exclusionary rule of the Fourth Amendment is applicable to administrative hearings, citing *Elder v. Bd. of Med. Exam.*, 241 Cal. App.2d 246, 50 Cal. Rptr. 304. Appellant also contends that Mr. Kissinger was not warned as to his constitutional rights (right to remain silent, right to counsel, and the possibility that anything he said could be used against him). (*Miranda v. Arizona*, 384 U.S. 436 (1966).)

In our opinion, the department investigators were acting within the scope of their authority in searching the licensed premises. Such a search is statutorily authorized by section 25753, Business and Professions Code, which gives the department agents the power to visit and inspect the premises of liquor licensees. The search was not illegal, and furthermore, it was made with Mr. Kissinger's consent. (R.T. 4, Vol. II.) The department investigators testified that their assignment was to conduct an ownership investigation at the licensed premises. Under its statutory authority, the department has a legitimate interest in

examining the premises of licensees for suspected violations of the licensing provisions of the Alcoholic Beverage Control Act and the penal statutes of the State of California as related thereto. In this regard, we acknowledge a question as to whether the department's legitimate interest in the licensed premises extends to the seizure of the two items described in count II and the resulting allegation that continuance of appellant's license would be contrary to public welfare or morals because the corporation president, John R. Kissinger, had in his possession for sale or distribution two simulated rubber penises. The department investigators testified that Mr. Kissinger told them that the objects were sold over the bar at the licensed premises. Mr. Kissinger denied making such a statement to the investigators and he testified that the simulated rubber penises were never sold over the bar at the licensed premises. (R.T. 85, Vol. II.) Appellant's witness, Don Geist, testified as follows with respect to the count II violation:

> "A. Yes, I have. John Kissinger and I flew to Los Angeles one week end and we stayed with a couple of girls down there and they had one of these at this bar, and they used it for a stir stick.
>
> "Q. You mean a private bar?
>
> "A. A private bar in their home. So, it was more or less a joke, and we brought one back and made a pattern from it. Down there it was a big joke, and you get behind a bar and stir your drink and they get a big kick out of it. It was more or less a joke."
>
> (R.T. 102:6-15, Vol. II.)

In argument the department contends that the possession and sale of such items over the bar on the licensed premises is contrary to public welfare or morals, notwithstanding whether or not it does or does not violate an expressed provision of the Penal Code. (R.T. 239, Vol. I.)

We are somewhat handicapped with respect to the count II violation. We do not have any information as to why the department considers the conduct charged to be violative of public welfare or morals. The department failed to introduce any evidence as to the nature of this violation. The only evidence as to the use of the simulated penises is that offered by appellant *(supra)*. We cannot say that such use is contrary to public welfare or morals. Furthermore, while we may not agree with the ruling of the hearing officer admitting exhibits 2 and 3 into evidence, such, in view of the following holding, is not of any particular significance. It is the opinion of this board that the department's findings (count II) do not support the department's decision. We reverse count II.

Turning to count I, appellant's primary attack is directed to the contention that the department has exceeded its jurisdiction as there was no showing by the department that anything was ever done or permitted to be done at appellant's premises which offended public health, safety, or morals, and that to permit the department to impose upon appellant its own code of public morality violates rights guaranteed to appellant under the Ninth and Fourteenth Amendments.

In support of the department's accusation, Department of Alcoholic Beverage Control Special Investigators Ferrero, Etter, D'Andrea, Gilbert, Filben, and Hicks testified as to investigations and observations made at appellant's premises. Eight exhibits were introduced into evidence by the department. The following persons testified on behalf of the licensee: Basil Nickerson, Frank McCann, Chris Thorpe, Ray Frost, Alvin Vorse, Miss Chuchie Resh and Miss Iola Dorcey, Hal Baud, William A. Kissinger, John Riley Kissinger, and Don Geist. Eight exhibits were introduced into evidence on behalf of the licensee.

In argument appellant contends:

(1) Appellant was denied a fair hearing as appellant was prejudiced by the severe restrictions on its right of cross-examination.

(2) Sections 24200 and 25601, Business and Professions Code, violate the Ninth and Fourteenth Amendments to the United States Constitution.

(3) The finding that appellant did permit, allow and suffer the various acts of misconduct is not supported by the evidence.

(4) The penalty of revocation constitutes an arbitrary, capricious act in view of the fact that appellant has made an honest and successful attempt to comply with the law.

We respond to appellant's main contentions under the following separate headings:

*Hearing:*

(A) ***Failure to Answer Appellant's Interrogatories:***

We do not agree with appellant's contention that it was prejudiced by reason of the department's refusal to answer interrogatories forwarded to the department prior to the hearing. There is no need for this board to pass on this question. The same issue was before the Court of Appeal and appellant's petition was denied. (*Francisco Enterprises, Inc. v. McDonald, Hearing Officer, and Dept. of Alcoholic Bev. Control,* 1 Civil 25398 [hearing by Supreme Court denied.])

(B) ***Failure to Obtain Investigators' Home Addresses:***

We find no error in the ruling of the hearing officer admitting into evidence the testimony of three department witnesses who refused to reveal their respective residence addresses. The witnesses were available to appellant at their employment headquarters. Appellant has not established prejudice because of the denial of the motion to strike. Furthermore, as reflected in the department decision, appellant failed to comply with the order of the hearing officer to file authority in support of argument advanced during the hearing. The hearing officer delayed ruling on appellant's motion to strike pending receipt of citations from appellant. In our opinion, appellant abandoned the alleged ground of error and such may not now be resurrected on appeal.

*Activity on the Licensed Premises*

Appellant argues at some length that there is nothing in the record to indicate that anything ever occurred at appellant's bar which had any bearing on public safety, convenience or health and that appellant's license is being revoked because of certain acts which the department believes were contrary to public morals. Homosexual activity on licensed premises has been discussed in a number of appellate decisions. The court in *Morrell v. Dept. of Alcoholic Bev. Control,* 204 Cal. App. 2d 504, 22 Cal. Rptr. 405, on this issue said:

> "It has been held that homosexual behavior such as that shown by the evidence before us constitutes lewd and obscene conduct and sexual perversion. . . ."

The court also said:

> ". . . 'We do not find it necessary to discuss the psychological aspects of homosexuality or to determine the outermost limits of homosexual conduct that amounts to sex perversion. All that we have to determine in this case is that the conduct here involved supports the finding that many of the patrons of this tavern, to the knowledge of the licensee, committed acts that should have informed the licensee that they were sex perverts, and that the acts amounted to sex perversion. The fact, if it be a fact, that these acts may not have been punishable under the Penal Code is immaterial. Seeking sexual satisfaction in the manner here described in a public tavern offends the moral sense of the general public. There are many things that can be done in the

> privacy of the home which may not be illegal but if done in a public tavern are directly offensive to public morals and decency, and demonstrate that the participants are sex perverts. The continuance of the license under such circumstances "would be contrary to public welfare or morals" as provided in our Constitution. That is the type of conduct here involved. Further than that we do not have to go.' . . ."

(See also *Vallerga v. Dept. of Alcoholic Bev. Control,* 53 Cal.2d 313, 1 Cal. Rptr. 494.)

(A) *Knowledge:*

Appellant contends that before it can be disciplined on the charges made in the department's accusation, there must be evidence that appellant's agents or officers had knowledge that the misconduct was occurring at the bar. We do not subscribe to such argument. The appellate courts of this State have announced certain principles of law regarding obligations of licensees with respect to conduct occurring on licensed premises. There is no inherent right of a citizen to engage in the business of selling alcoholic beverages, and a licensee has an active and affirmative duty to see that his premises are operated in compliance with the law and in a manner that meets minimum requirements of decency and morality. (*Givens v. Dept. of Alcoholic Bev. Control,* 176 Cal. App. 2d 252, 1 Cal. Rptr. 446.) If a licensee violates a law at his premises or if through passive conduct or inaction he permits such violations to occur on his premises, he becomes subject to disciplinary action.

(*Swegle v. State Bd. of Equal.*, 125 Cal. App. 2d 432, 270 P.2d 518.)

Appellant argues that all instances of misconduct occurred during a prior management of the bar; that when Mr. Kissinger took over management of the bar, he instituted reforms that have been so successful that not one instance of misconduct was reported to the hearing officer in the year and one-half that Mr. Kissinger has been running the licensed premises. The accusation in the present matter covers the approximate period September 1, 1966, to June 1, 1967. This accusation was served on June 30, 1967, and the hearing was restricted to incidents occurring during the aforementioned period. The department is obviously aware of the licensee's operation since June 1, 1967. Such a factor, however, is not before this board with respect to our review of the decision subject to the instant appeal.

This board in many previous decisions has stated that in its opinion the department is legally vested with authority to regulate the highly sensitive alcoholic beverage industry. Where, as here, the department properly exercised the police powers of the State by a procedure affording due process of law, there is no error.

With respect to count I, it is our opinion that the findings are supported by substantial evidence and that the findings support the department's decision. We affirm count I. We reverse count II. As separate penalties have been imposed as to each count, there is no need to remand this matter to the department

for further action. (*Mast v. State Bd. of Optometry*, 139 Cal. App. 2d 78, 293 P.2d 148.)

James M. Shumway, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Manuel Quevedo, Jr.
Adrienne Sausset
Sacramento, California
June 15, 1970

## Appendix 5

**CALIFORNIA CONSTITUTION, WEST'S ANN. CAL. CODE, VOL. 3, 1973 CUM. POCKET PART, pp. 98-100**

*California Constitution, Art. 20,*
*§ 22. Alcoholic beverages*

Sec. 22. The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic beverages specified in the licenses may be sold and served for consumption upon the premises:

(a) For bona fide public eating places, as defined by the Legislature.

(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years shall be permitted to enter and remain in any such premises without lawful business therein.

(c) For public premises for the sale and service of beers alone.

(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all

members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each

house, to remove any member from office for dereliction of duty or corruption or incompetency.

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested

by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

A concurrent resolution for the removal of either the director or any member of the board may be introduced in the Legislature only if five Members of the Senate, or 10 Members of the Assembly, join as authors.

Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the Alcoholic Beverage Control Act, insofar as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of alcoholic beverages, shall be the amounts prescribed as of the operative date hereof, subject to the power of the Legislature to change such fees.

The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages, where such alcoholic beverages are not to be consumed on the premises where sold; and may provide for the issuance of all types of licenses necessary to carry on the activities referred to in the first paragraph of this section, including but not limited to, licenses necessary for the manufacture, production, processing, importation, exportation, transportation, wholesaling, distribution, and sale of any and all kinds of alcoholic beverages.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed.

The provisions of this section shall be self-executing, but nothing herein shall prohibit the Legislature from enacting laws implementing and not inconsistent with such provisions.

This amendment shall become operative on January 1, 1957.

## Appendix 6

State of California
Department of Alcoholic Beverage Control

| | |
|---|---|
| In the Matter of the Accusation against<br>Francisco Enterprises, Inc. d.b.a. Fe Be's<br>Respondent(s)<br>Premises: 1501 Folsom Street, San Francisco<br>License(s): On-Sale General, Public Premises | File 57212<br>Reg. 3806<br>License Nos. 48 |

### ACCUSATION

Under Alcoholic Beverage
Control Act
and State Constitution

I hereby complain and accuse the above respondent(s), holding the above license(s), based on the following statement of fact:

*Count I:*

The continuance of the above mentioned license would be contrary to public welfare and morals and grounds for suspension or revocation of said license exist within the meaning of Article XX, Section 22 of the California State Constitution and Sections 24200(a), 24200(b), and 25601 of the Business and Professions

Code in that the above named licensee did permit, allow and suffer the above mentioned licensed premises to be used as a disorderly house and a place to which people resorted for purposes injurious to the public morals, health, convenience, and safety, in that on the following dates the following acts of disorder occurred:

a. On or about September 1, 1966, male patron #1 described below, did fondle the genital area of male patron #2 described below.

   #1 White, male, adult, 25 years of age, 5′ 10″, 165 pounds, wearing dark blue nylon jacket, dark blue T-Shirt, light blue jeans with wide black belt, and small rhinestone earring in left ear. Called John.

   #2 White, male, adult, 26 years of age, 5′ 10″, 150 pounds, brown hair, wearing a tan jacket, and dark trousers. Called Francois.

b. On or about September 1, 1966, male patron #1 described in subcount above, did kiss male patron #2 described in subcount above, three times upon the neck.

c. On or about May 19, 1967, male patron #1 described below did kiss male employee #2 described below, on the left ear.

   #1 White, male, adult, 28 years of age, brown crew cut hair, 5′ 11″, 170 lbs., wearing a dark windbreaker jacket, T-shirt, and dark trousers.

#2 White, male, adult, 32 years of age, dark hair, 6′ 0″, 150 lbs., wearing a black vest with words "Fe Be's" on it, dark shirt and dark trousers, and black leather band, approximately 2 inches in width on left wrist.

d. On or about May 24, 1967, male patron #1 described below did rub his buttocks area into the genital area of male patron #2 described below

#1 White, male, adult, 25 years of age, 6′ 2″, 160 lbs., brown hair, wearing a dark pullover sweater, dark shirt, and tan trousers.

#2 White, male, adult, 30 years of age, 5′ 10″, 175 pounds, reddish brown hair, wearing a cowboy hat, blue levis, light colored tab collar dress shirt, buckskin jacket with wool fleece on the inside.

e. On or about May 24, 1967, male patron #2, described in subcount d above, did place his hand inside the trousers of male patron #1 described in subcount d above.

f. On or about May 25, 1967, male patron #1 described below, did kiss male patron #2 described below, upon the mouth.

#1 White, male, adult, 55 years of age, 5′ 10″, 180 pounds, grey hair, balding, wearing a dark suit, white shirt, and tie.

#2 White, male, adult, 46 years of age, 6′ 1″, 200 pounds, brown hair, wearing a light colored sport coat, dark trousers, white shirt and tie. Called Tom.

g. On or about May 25, 1967, male patron #1 described below, and male patron #2 described below, did place their arms around each other, grasping the buttocks area of each other, and engage in movements associated with sexual intercourse.

#1 White, male, adult, 25 years of age, 6′ 1″, 180 pounds, black hair, wearing a black leather motorcycle cap with a white bill, black leather jacket, and white levis.

#2 White, male, adult, 25 years of age, 6′ 2″, 200 pounds, black hair, wearing blue levi jacket and trousers.

h. On or about May 26, 1967, male patron #1, described below, did kiss male patron #2 described below, upon the right cheek and ear.

#1 White, male, adult, 30 years of age, 6′ 2″, 155 pounds, blond hair, wearing blue denium jacket and trousers.

#2 White, male, adult, 30 years of age, 5′ 6″, 155 pounds, blond hair, wearing tan jacket and trousers.

i. On or about June 1, 1967, the above named licensee did suffer, permit, and allow male patron #1

described below to engage in conversations which were lewd, vulgar, obscene and offensive on the above named premises.

#1 White, male, adult, 40 years of age, 5′ 10″, 170 pounds, black hair, wearing a light colored grey plaid suit, pinstriped shirt, and dark tie. Called Camille.

j. On or about June 1, 1967, male patron #1 described in subcount i above, did rub the genital area of Special Investigator Paul E. D'Andrea.

k. On or about June 1, 1967, male employee #1 described below, did hug male patron #1, described in subcount i above.

Employee #1 White, male, adult, 26 years of age, 5′ 6″, 160 pounds, brown short hair, wearing a blue plaid shirt, and blue levis. Not on duty.

*Count II:* The continuance of the above named license would be contrary to public welfare and morals and grounds for suspension or revocation of said license exist within the meaning of Article XX, Section 22 of the California State Constitution, and Sections 24200(a), 24200(b) and 25601 of the Business and Professions Code in that on or about April 26, 1967, President John R. Kissinger had in his possession for sale or distribution, two simulated rubber penises.

Licensee(s) Previous Record: "48" Licensed at above premises since June 16, 1966.

No record of disciplinary action.

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such licenses(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code; Counts I & II

(2) That additional grounds for suspension or revocation under Section 24200(a) (b) (—), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) 25601

(b) Title IV, Cal. Admin. Code, Rule(s)_____

(c) Other law: Count II—Section 311.2 Penal Code

WHEREFORE, I recommend that a hearing be held on this accusation.

Dated this 8th day of June 1967.

/s/
Acting District Administrator
Department of Alcoholic Beverage Control
San Francisco

*Reviewed:*

Statement to Respondent(s)

Unless a written request for a hearing, signed by you, or on your behalf, is delivered, or mailed, to the Department of Alcoholic Beverage Control within fifteen (15) days after the foregoing accusation was personally served on you or mailed to you, the Department of Alcoholic Beverage Control may proceed upon the accusation without a hearing to take action thereon as provided by law. The request for a hearing may be made by delivering or mailing the enclosed form entitled: "Notice of Defense," or by delivering or mailing a notice of defense to the Department of Alcoholic Beverage Control, 1215 O Street, P.O. Box 1139, Sacramento, California 95805, as provided by Section 11506 of the Government Code. The "Notice of Defense" forwarded herewith, if signed and returned to the Department of Alcoholic Beverage Control, shall be deemed a specific denial of all parts of the accusation, but you will not be permitted to raise any objection to the form of the accusation, unless you file a further notice of defense as provided in Section 11506 of the Government Code within said 15 days after service of said accusation upon you.

## Appendix 7

Garry, Dreyfus, McTernan & Brotsky
341 Market Street
San Francisco, California 94105
Telephone: 392-1320
Attorneys for Plaintiff

In the United States District Court
Northern District of California

No. C-70 2372

Francisco Enterprises, Inc., a corporation,
Plaintiff,

vs.

Edward J. Kirby, Peter T. Sexton, Ronald Lockyer and Jay D. Caldiss,
Defendants.

[Filed November 4, 1970]

### COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, by this verified complaint, seeks injunctive relief against the named defendants, restraining them from revoking, confiscating and interfering with the enjoyment and use of plaintiff's general on-sale alcoholic beverage license. In support thereof plaintiff alleges:

A. *Jurisdiction*

1. This action is founded on claims arising from violations of 42 U.S.C. §§1981, 1983, 1988 and the

First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The matter in controversy exceeds the value of $10,000 exclusive of interest and costs.

2. This court has jurisdiction herein under the provisions of 28 U.S.C. §§1331 and 1343(3), (4).

B. *Parties*

3. Plaintiff is a California corporation, doing business as "Fe Be's", in the City and County of San Francisco. Plaintiff is and at all times pertinent has been the holder of a valid, on-sale general, public premises alcoholic beverages license, No. 48-57212, issued on June 16, 1966 by the California Department of Alcoholic Beverage Control (hereinafter "Department").

4. Defendants and their capacities are as follows:

(a) Edward J. Kirby is Director of Alcoholic Beverage Control (hereinafter "ABC") of the State of California and is the chief administrative officer responsible for enforcement of the State's laws respecting licenses for the sale of alcoholic beverages.

(b) Peter T. Sexton is Deputy Director of ABC and is responsible for performing the duties of defendant Kirby in his absence.

(c) Ronald Lockyer is Assistant Director of ABC for the Northern Division and is responsible for carrying out the directives of defendant Kirby and Sexton in Northern California.

(d) Jay D. Caldiss is the District Administrator of ABC for the San Francisco District and is

responsible for carrying out the directives of defendants Kirby, Sexton and Lockyer in the City and County of San Francisco.

C. *Cause of Action*

5. The market value of the aforementioned license exceeds $20,000.00.

6. Defendants, and each of them, have purported to revoke said license and threaten to, intend to/and unless restrained by this court will confiscate said license.

7. Possession of said license is a necessary condition under the laws of the State of California to plaintiff's ability to engage in the lawful business of operating a tavern soliciting the trade of the general public. If said license is confiscated, plaintiff will be put out of business and the owners, operators, employees and stockholders of plaintiff will be deprived of their livelihood; and plaintiff will lose the value of said license as aforesaid.

8. Said purported revocation and threatened confiscation are unlawful, arbitrary, discriminatory, confiscatory and in violation of the Constitution of the United States in the following respects:

(a) Said purported revocation and threatened confiscation are pursuant to an order of the Department of Alcoholic Beverage Control following an administrative hearing upon an accusation filed by the Department and by defendants herein, alleging violations by plaintiff of California Business and Professions Code §§24200 and 25601 and Article XX,

§22 of the California Constitution. Copies of the Accusation, the proposed Decision (adopted on July 18, 1968) and the Decision of the Alcoholic Beverage Control Appeals Board are attached hereto as Exhibits A, B and C, [not included in this Appendix] respectively, and incorporated herein. These provisions are framed in broad and vague regulatory terms concerning "public welfare or morals" and "public morals, health, convenience or safety."*

At the aforementioned administrative hearing, defendants introduced no evidence as to the standards applied by defendants in determining that plaintiff had violated said provisions and that an order of revocation and confiscation of plaintiff's license should issue. In the absence of any such evidence in the administrative proceedings, the purported revocation and threatened confiscation of plaintiff's license constitutes a taking of plaintiff's property without due process of law in violation of the Fifth, Sixth and Fourteenth Amendments in the following respects:

(1) by denying plaintiff's right to notice of the charges contained in the accusation and an opportunity to defend against them;

(2) by denying an effective hearing on the charges in the accusation;

(3) by denying the effective assistance of counsel in defending against the accusation;

---

*Said provisions are set forth in full in the accompanying points and authorities and incorporated herein by reference.

(4) by permitting arbitrary and capricious application of the laws against plaintiff, since the procedure followed therein confers on defendants unlimited discretion to determine whose license shall be revoked and confiscated.

(b) Plaintiff alleges on information and belief that defendants brought and prosecuted said accusation against plaintiff and plaintiff's license under color of state law pursuant to a plan, scheme and conspiracy to eliminate plaintiff's business because it is frequented by adult male homosexuals and for no other reason.

On April 26, 1967, pursuant to said plan, scheme and conspiracy, defendants' agents and employees, acting under defendants' supervision, direction and control, ransacked and conducted a general search at plaintiff's offices without warrant and without probable cause to search said premises, for the purpose of harassing and intimidating plaintiff and causing it to go out of business.

Pursuant to said plan, scheme and conspiracy, defendants' agents and employees, acting under defendants' supervision, direction and control, disguised themselves as homosexuals and solicited acts of homosexual conduct in plaintiff's premises for the purpose of manufacturing evidence upon which to base the aforementioned accusation.

(c) Said plan, scheme and conspiracy and the manner by which defendants have carried it out violate plaintiff's rights under the First, Fourth, Fifth and Fourteenth Amendments in the following respects:

(1) by denying plaintiff's right to the equal protection of the laws and by unequal enforcement of the laws against plaintiff without rational basis in public policy;

(2) by searching and ransacking plaintiff's premises in violation of the Fourth Amendment with knowledge that plaintiff had and has no effective sanction against such conduct by defendants under color of law except by the expensive course of seeking the relief sought in the instant complaint;

(3) by casting a chilling effect on the rights of plaintiff's patrons to gather and associate for lawful purposes in plaintiff's premises.

(d) The state law under which defendants purported to revoke and threaten to confiscate plaintiff's said license does not provide for mandatory judicial review of the said administrative acts of defendants and thereby defendants' acts deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

D. *Grounds for Equitable Relief*

9. Plaintiff has exhausted its state remedies in that:

(a) it appeared at a hearing of the Department held in San Francisco on September 18 and 19, 1967 and May 27, 1968;

(b) it appealed the adverse decision of the Department in compliance with the applicable state procedures to the Alcoholic Beverage Control Appeals

Board, which Board on June 18, 1970 affirmed the findings of the Department on the first of two counts in the aforementioned accusation but reversed as to the second count. The penalty imposed under the first count was revocation of plaintiff's license;

(c) On July 17, 1970, pursuant to the mandatory and exclusive procedure set forth in California Business and Professions Code, §23090, plaintiff timely filed a petition for writ of review in the Court of Appeal of the State of California, for the First Appellate District which petition was denied without opinion or hearing on July 20, 1970;

(d) plaintiff then sought hearing by timely petition for hearing to the California Supreme Court on July 29, 1970. Said petition was denied on September 10, 1970, without opinion or hearing.

10. No provision of California law affords plaintiff a remedy following the aforementioned procedure and plaintiff has no remedy under state law.

11. The federal constitutional questions raised by plaintiff before the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board have never been judicially reviewed on their merits by any court in the State of California or elsewhere.

12. Plaintiff is aggrieved by the erroneous decision of the Department and will be irreparably damaged if enforcement of the penalty of revocation by defendants as aforementioned is not stayed and restrained by this court.

13. Plaintiff has no adequate remedy at law.

14. Continuation of plaintiff's license pending hearing and final determination of this complaint will cause no detriment to the public health, safety, welfare or morals in that during the more than three years since the accusation was filed, no employee or patron misconduct or unlawful activity has occurred nor has any been charged by the Department or by any other public agency.

Wherefore, plaintiff prays that this Court:

A. Issue an order directing defendants, and each of them, to show cause why they should not be restrained from enforcing the purported revocation of and confiscating plaintiff's aforementioned license pending hearing and determination of this complaint for permanent injunctive relief;

B. Temporarily restrain defendants, their agents, employees and others acting on their behalf from enforcing the purported revocation of and confiscating plaintiff's aforementioned license, pending hearing on the order to show cause; and

C. Make its decree permanently enjoining defendants, their agents and employees and others acting on their behalf, from enforcing the purported revocation and confiscating plaintiff's aforementioned license.

D. For such other and further relief as may be just and proper.

Dated: October 21, 1970.

Garry, Dreyfus, McTernan & Brotsky
By: Francis J. McTernan
By: Allan Brotsky
Attorneys for Plaintiff

SUPREME COURT, U. S.

JAN 24 1974

MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-798**

FRANCISCO ENTERPRISES, INC., a corporation,
*Petitioner,*

vs.

EDWARD J. KIRBY, PETER T. SEXTON, RONALD LOCKYER and JAY D. CALDISS,
*Respondents.*

## Brief in Opposition to Petition for Writ of Certiorari

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# In the Supreme Court of the United States

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**No. 73-798**

FRANCISCO ENTERPRISES, INC., a corporation,
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EDWARD J. KIRBY, PETER T. SEXTON,
RONALD LOCKYER and JAY D. CALDISS,
*Respondents.*

## Brief in Opposition to Petition for Writ of Certiorari

### OPINION BELOW

The opinion of the United States Court of Appeals, Ninth Circuit, No. 71-1813, on appeal from the United States District Court for the Northern District of California is reported at 482 F.2d 481 and may be found in Appendix 1 of the Petition for Writ of Certiorari. Petitioner's petition for rehearing was denied by the United States Court of Appeals on August 20, 1973.

### JURISDICTION

The jurisdiction of this Court was invoked under the provisions of section 1254(1) of Title 28, United States Code.

## QUESTIONS PRESENTED

While the instant petition for a writ of certiorari frames the "question presented" as being whether a prior adjudication by a state court should be a res judicata bar to a 42 U.S.C. § 1983 action in a federal district court, respondents submit that viewed in the facts and context of this case the actual question presented also inevitably involves whether a United States District Court may exercise appellate review over, and enjoin, a final state court judgment.

## STATUTES INVOLVED

The constitution and statutes involved are Article XX, Section 22 of the California Constitution dealing with the state constitution's establishment of the California Department of Alcoholic Beverage Control as a judicial tribunal; sections 23090 through 23090.7 of the California Alcoholic Beverage Control Act[1] dealing with the review of California Department of Alcoholic Beverage Control adjudicatory decisions by way of a writ of review (certiorari) in the California Supreme Court or the California Court of Appeal; and sections 1067 through 1077 of the California Code of Civil Procedure dealing with state appellate review by way of writs of review (certiorari) to inferior judicial tribunals. Also pertinent are 28 U.S.C. § 1257 which vests only in this Honorable Court the jurisdiction to review final judgments of state courts, and 28 U.S.C. § 2283 which prohibits federal district courts from enjoining state court judgments.

California Constitution, Article XX, Section 22

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein pro-

1. California Business and Professions Code, Division 9, §§ 23090 through 23090.7.

vided and in accordance with the laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. *The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuaunce of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.*" (Emphasis added)

California Alcoholic Beverage Control Act,
Sections 23090, 23090.2, 23090.3 and 23090.5

Under California statutory and constitutional law, review of Department of Alcoholic Beverage Control adjudicatory decisions is by way of appeal to the constitutionally created[2] California Alcoholic Beverage Control Appeals Board and thence by petition for a writ of review (certiorari) in the California Supreme Court or the California Court of Appeal:

"23090. Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within 30 days after filing of the final order of the board."

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2. Article XX, section 22 of the California Constitution establishes the Alcoholic Beverage Control Appeals Board as an appellate tribunal to review adjudicatory decisions of the Department of Alcoholic Beverage Control. If the Appeals Board affirms the Department's decision, the licensee may then petition the California Supreme Court or the California Court of Appeal for a writ of review (certiorari).

"23090.1 The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board."

"23090.2 The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:

(a) The department has proceeded without or in excess of its jurisdiction.

(b) The department has proceeded in the manner required by law.

(c) The decision of the department is supported by the findings.

(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.

(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

"23090.3 The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for

further proceedings before or reconsideration by the department."

"23090.4 The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board."

"23090.5 No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

"23090.6 The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs."

"23090.7 No decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which application may be made for a writ of review, as provided by section 23090."

## STATEMENT OF THE CASE

Petitioner was[3] a corporate on-sale general public premises licensee of the California Department of Alcoholic

3. The revocation of petitioner's alcoholic beverages license was placed into effect on October 1, 1970, after the California Supreme Court had denied a hearing and stay order.

Beverage Control and as such exercised the privileges of selling alcoholic beverages at retail for consumption on its licensed premises.

On June 8, 1967, an accusation was filed with the California Department of Alcoholic Beverage Control (hereinafter referred to as the Department) against petitioner's alcoholic beverages license. The accusation was pled in two (2) counts and alleged in substance that continuance of petitioner's alcoholic beverages license would be contrary to public welfare and morals within the meaning of Article XX, Section 22 of the California Constitution and sections 24200(a), 24200(b) and 25601 of the California Alcoholic Beverage Control Act, in that petitioner had permitted and allowed the licensed alcoholic beverages premises to be used as a disorderly house and a place to which people resorted for purposes injurious to the public morals, health and safety.

Count I of the accusation alleged in numerous subcounts that on various dates the petitioner-licensee had permitted on the licensed premises overt sexual acts and conduct between male patrons and between a male patron and an employee of the petitioner-licensee. Count II alleged that petitioner-licensee's president had in his possession for sale or distribution two (2) simulated rubber penises.

Petitioner filed a Notice of Defense and requested a hearing on the charges.

On September 18 and 19, 1967, and on May 27, 1968, adjudicatory hearings were held on the accusation before the Department;[4] petitioner was represented by counsel, evidence was adduced, and the proceedings were reported.

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4. The California Department of Alcoholic Beverage Control is a California state court of limited jurisdiction. Calif. Constitution, Art. XX, Sec. 22; Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal.2d 238 (1959); Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545 (1946).

On July 18, 1968, the Department filed its decision which found the allegations of the accusations to be true and ordered the revocation of petitioner's alcoholic beverages license on Count I and a 30 day suspension of the license on Count II.

Petitioner then filed an appeal with the California Alcoholic Beverage Control Appeals Board (hereinafter referred to as the Appeals Board), the appellate tribunal established by the California Constitution[5] to review adjudicatory decisions of the Department.

On June 18, 1970, after receiving written and oral argument, the Appeals Board filed its opinion wherein it affirmed the Department's decision as to Count I and, concluding that the possession of the simulated rubber penises by petitioner's president was not grounds for disciplining the license, reversed the Department's decision as to Count II.

On July 17, 1970, petitioner filed a petition for a writ of review (certiorari) in the California Court of Appeal, First Appellate District. The California Court of Appeal denied petitioner's petition for a writ of review.

On July 29, 1970, petitioner petitioned the California Supreme Court for a hearing.

On September 10, 1970, the California Supreme Court denied petitioner's petition for a hearing.

On October 1, 1970, the revocation of petitioner's alcoholic beverages license was placed into effect.

On November 1, 1970, petitioner filed its complaint for injunctive relief in the United States District Court for the Northern District of California seeking to have the respondents restrained and enjoined from enforcing the Department's decision revoking petitioner's alcoholic beverages license.

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5. California Constitution, Article XX, Section 22.

On November 17, 1970, respondents filed in the District Court their opposition to a preliminary injunction; and on November 23, 1970, respondents filed their notice of motion and motion to dismiss the action on the grounds: that the United States District Court was without jurisdiction to exercise appellate review of a state court judgment, that the District Court could not entertain a collateral attack against a state court judgment by way of an injunctive relief action, that the final state court judgment was a res judicata bar to the federal action, and that petitioner's remedy was by way of review in the United States Supreme Court.

On March 29, 1971, the United States District Court dismissed the action.

On April 15, 1971, petitioner filed its Notice of Appeal to the United States Court of Appeals, Ninth Circuit.

On July 19, 1973, the United States Court of Appeals filed its decision affirming the judgment of the United States District Court.

## ARGUMENT

### 1. The California Department of Alcoholic Beverage Control Is a California State Court of Limited Jurisdiction.

Petitioner contends that the California Department of Alcoholic Beverage Control is merely an administrative agency and that its adjudicatory decisions are not those of a state court nor res judicata as to federal court actions. Such is simply not so.

The California Department of Alcoholic Beverage Control is *not* a legislatively created administrative agency, but is a California state tribunal created and established directly by the California Constitution and vested with judicial powers by the California Constitution. *California*

*Constitution*, Article XX, Section 22. The California courts have recognized that the Department of Alcoholic Beverage Control is a state constitutional tribunal exercising adjudicatory powers. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131-132, 173 P.2d 545 (1946); *Martin v. ABC Appeals Board & Richards*, 53 Cal.2d 238, 241-242, 340 P.2d 1 (1959); *Dept. of Alcoholic Beverage Control v. Superior Court*, 268 Cal.App.2d 67, 70 (1968); *Kirby v. Superior Court*, 275 Cal.App.2d 975 (1969).

The position of the California Department of Alcoholic Beverage Control as a court of limited jurisdiction is further recognized by the review procedures of Department adjudicatory decisions. The California Superior Court (general trial court) is prohibited from reviewing, restraining, enjoining, or interfering in any way with adjudicatory decisions of the Department. Section 23090.5, *California Alcoholic Beverage Control Act*. Review of Department adjudicatory decisions is by way of a writ of review (certiorari) in the California Supreme Court and in the California Court of Appeal. Section 23090 *et seq.*, *California Alcoholic Beverage Control Act*.

As succinctly set forth by the United States District Court below:

> ". . . .
>
> The foregoing legislative and case history indicates that the present Department of Alcoholic Beverage Control has succeeded to the status formerly held by the State Board of Equalization in matters of liquor control. Although there are no California cases directly in point, it is clear to this Court that the California courts do consider the Department of Alcoholic Beverage Control to be a state court of limited jurisdiction, *Martin v. Alcoholic Beverage Control Appeals Board*, 52 Cal.2d 238 (1959), and similar in nature to

other constitutionally created California state courts of limited jurisdiction such as the California Public Utilities Commission and the Workmen's Compensation Appeals Board. *Department of Alcoholic Beverage Control v. Superior Court*, 268 C.A.2d 67, 73 Cal. Rptr. 780 (1968).

. . . .

Since the Department of Alcoholic Beverage Control is a state court of limited jurisdiction, this District Court cannot exercise appellate review over its judgment, not entertain a collateral attack by way of an action for injunctive relief. *Flynn v. State Board of Chiropractic Examiners, supra* (418 F.2d 668), *Wilke & Holzheiser, Inc. v. Reimel, supra* (266 F.Supp. 168 N.D. Calif. 1967), *Rooker v. Fidelity Trust Company, supra* (263 U.S. 413). Plaintiff's remedy after the Department of Alcoholic Beverage Control's decision became final by the denial of plaintiff's petition for a writ of review in the California Court of Appeal and in the California Supreme Court was that of appeal or petition for certiorari in the United States Supreme Court. *Wilke & Holzheiser, Inc. v. Reimel, supra.*"

(*Francisco Enterprises, Inc. v. Kirby et al*, U.S.D.C. Northern Dist. of Calif., No. C-70-2372; see Appendix 2 to Petition for Writ of Certiorari)

This status of the California Department of Alcoholic Beverage Control was examined and affirmed by the United States Court of Appeals, Ninth Circuit, below:

"The district court's dismissal on the above grounds was predicated upon a determination that 'the California Department of Alcoholic Beverage Control is a state court of limited jurisdiction.' The district court made such a determination after examination of relevant California law. Martin v. Alcoholic Beverage Control Appeals Board, 340 P.2d 1 (1959); Covert v. State Board of Equalization, 173 P.2d 545 (1946).

> We agree with the district court's conclusion that California law considers the Department of Alcoholic Beverage Control to be a state court of limited jurisdiction. *See Martin and Covert, supra,* and that res judicata principles precluded its entertaining the federal complaint."
>
> (*Francisco Enterprises, Inc. v. Kirby et al,* 482 F.2d 481, 484-485)

And just recently in a similiar case to this one, the United States Court of Appeals, Ninth Circuit, reaffirmed the foregoing status of the California Department of Alcoholic Beverage Control as a California state court of limited jurisdiction whose adjudicatory decisions are not subject to attack or review in the federal district courts. *Kuzinich dba The Pink Poodle v. Kirby, et al,* Nos. 72-1131 and 72-1132, December 11, 1973:

> "On Appeal from the United States District Court for the Northern District of California
>
> Before CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.
>
> PER CURIAM:
>
> The judgment of dismissal is affirmed. See *Francisco Enterprises, Inc. v. Kirby, et al,* 482 F.2d 481 (9th Cir. 1973)."

**2. A Final State Court Judgment May Be Reviewed Only by the United States Supreme Court. Res Judicata Bars a Party from Relitigating His Claims in a Federal District Court.**

This is *not* an *England v. Louisiana Board of Medical Examiners* (375 U.S. 411) case. Petitioner did not initially enter the federal district court seeking relief from threatened or actual state action only to have the federal court abstain and send the petitioner to the state courts first.

On the contrary, state proceedings were initiated against petitioner's alcoholic beverages license and, in proceedings extending over three (3) years,[6] the facts and issues—including petitioner's federal constitutional claims—were heard and litigated in the California state courts. Then, after the Department of Alcoholic Beverage Control's adjudicatory decision had become final when the California Court of Appeal and the California Supreme Court denied petitioner's petition for a writ of review, petitioner, instead of seeking review and relief in this Honorable Court, filed an injunctive relief action in the federal district court seeking to have the Department's decision enjoined.

As aptly put by the Court of Appeals below:

> "Res judicata principles have been consistently applied to preclude parties from relitigating federal constitutional claims in a federal district court subsequent to an adverse determination on the merits of such claims by a state court of competent jurisdiction. The sole recourse for the losing litigant is by appeal or writ of certiorari to the United States Supreme Court."
>
> (*Francisco Enterprises, Inc. v. Kirby, et al,* 482 F.2d 481, 485)

28 U.S.C. § 1257 vests only in this Honorable Court the jurisdiction to review final state court judgments. Petitioner's recourse from the final adverse state judgment against it was by appeal or petition for certiorari to this Honorable Court. Petitioner may not relitigate its claims in the federal district court and have the federal district court review and enjoin the state court judgment.

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6. The accusation against petitioner's alcoholic beverages license was filed on June 8, 1967. The California Supreme Court filed its order denying petitioner's petition for a hearing on September 10, 1970.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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